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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

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CHAPTER II

NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

CONTENTS

GE.97-62403 (E)

CONTENTS (continued)

PART I. GENERAL PROVISIONS

Article 1 1/

Right to a nationality

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Commentary

(1) Article 1 is a key provision, the very foundation of the present draft articles. It states the main principle from which other draft articles are derived. The core element of this article is the recognition of the right to a nationality in the exclusive context of a succession of States. Thus, it applies to this particular situation the general principle contained in article 15 of the Universal Declaration of Human Rights, which was the first international instrument embodying the "right of everyone to a nationality".

(2) The Commission acknowledged that the positive character of article 15 has been disputed in the doctrine. 2/ It has been argued, in particular, that it is not possible to determine the State vis-à-vis which a person would be entitled to present a claim for nationality, i.e. the addressee of the obligation corresponding to such a right. 3/ However, in the case of a succession of States, it is possible to identify such State. It is either the successor State, or one of the successor States when there are more than one, or, as the case may be, the predecessor State.

1/ Article 1 corresponds to article 1, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 35.

2/ See Johannes M.M. Chan, "The right to a nationality as a human right: The current trend towards recognition", Human Rights Law Journal, vol. 12, Nos. 1-2 (1991), pp. 1-14.

3/ See the comment by Rezek, according to whom article 15 of the Universal Declaration sets out a "rule which evokes unanimous sympathy, but which is ineffective, as it fails to specify for whom it is intended". José Francisco Rezek, "Le droit international de la nationalité", Recueil des cours ... 1986-III, vol. 198, p. 354.

(3) The right embodied in article 1 in general terms is given more concrete form in subsequent provisions, as indicated by the phrase “in accordance with the present draft articles”. This article cannot therefore be read in isolation.

(4) The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links that persons referred to in article 1 may have with one or more States involved in the succession. In most cases, such persons have links with only one of the States involved in a succession. Unification of States is a situation where a single State - the successor State - is the addressee of the obligation to attribute its nationality to these persons. In other types of succession of States, such as dissolution, separation or transfer of territory, the major part of the population has also most, if not all, of its links to one of the States involved in the territorial change: it falls within the category of persons resident in the territory where they were born and with which they are bound by many other links, including family and professional ties, etc.

(5) In certain cases, however, persons may have links to two or even more States involved in a succession. In this event, a person might either end up with the nationality of two or more of these States or, as a result of a choice, end up with the nationality of only one of them. Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality. This is the meaning of the phrase “has the right to the nationality of at least one of the States concerned”. The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State.

(6) Another element which is stated expressly in article 1 is that the mode of acquisition of the predecessor State's nationality has no effect on the scope of the right of the persons referred to in this provision to a nationality. It is irrelevant in this regard whether they have acquired the nationality of the predecessor State at birth, by virtue of the principles of

jus soli or jus sanguinis, or by naturalization, or even as a result of a previous succession of States. 4/ They are all equally entitled to a nationality under the terms of this article.

Article 2 5/

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

4/ As stated in the comment to article 18 of the 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law, "there is no reason whatsoever for drawing a distinction between persons who have acquired nationality at birth and those who have acquired nationality through some process of naturalization prior to the [succession]". (Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 63).

5/ Article 2 corresponds to the definitions proposed by the Special Rapporteur in footnote * of his Third report, document A/CN.4/480, p. 19.

Commentary

(1) The definitions in subparagraphs (a), (b), (c), (e) and (g) are identical to the respective definitions contained in article 2 of the two Vienna Conventions on the succession of States. The Commission decided to leave these definitions unchanged so as to ensure consistency in the use of terminology in its work on questions relating to the succession of States. 6/ The definitions contained in subparagraphs (d) and (f) have been added by the Commission for the purposes of the present topic.

(2) The term "succession of States", as the Commission already explained in 1974 in its commentary to this definition, is used "as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". 7/ Unlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals. It is therefore to be noted that the said replacement of one State by another generally connotes replacement of one jurisdiction by another with respect to the population of the territory in question, which is of primary importance for the present topic.

(3) As in the case of the Commission's previous work on the topic of the succession of States, the current draft articles relate only to cases of "succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". 8/

6/ See also the earlier position of the Commission on this point. Yearbook ... 1981, vol. II (Part Two), p. 22, document A/36/10, para. (4) of the commentary to article 2 of the draft articles on succession of States in respect of State property, archives and debts.

7/ Yearbook ... 1974, vol. II (Part One), p. 175, document A/9610/Rev.1, para. (3) of the commentary to article 2 of the draft articles on succession of States in respect of treaties.

8/ See article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. As stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, the Commission "in preparing draft articles for the codification of the rules of general international law normally assumes that

(4) The meanings attributed to the terms “predecessor State”, “successor State” and “date of the succession of States” are merely consequential upon the meaning given to “succession of States”. It must be observed that, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.

(5) Subparagraph (d) provides the definition of the term “State concerned”, by which, depending on the type of the territorial change, are meant the States involved in a particular case of “succession of States”. These are the predecessor State and the successor State in the case of a transfer of part of the territory (art. 20), the successor State alone in the case of a unification of States (art. 21), two or more successor States in the case of a dissolution of States (arts. 22 and 23) and the predecessor State and one or more successor States in the case of a separation of part of the territory (arts. 24 to 26). The term “State concerned” has nothing to do with the “concern” that any other State might have about the outcome of a succession of States in which its own territory is not involved.

(6) Subparagraph (f) provides the definition of the term “person concerned”. The Commission considered it necessary to include such a definition, since the inhabitants of the territory affected by the succession of States may include, in addition to the nationals of the predecessor State, nationals of third States and stateless persons residing in that territory on the date of the succession.

(7) It is generally recognized, that “[p]ersons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality. On the other hand, stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an 'inchoate right' on the part of any State to naturalize stateless

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those [draft] articles are to apply to facts occurring and situations established in conformity with international law ... . Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law”. Yearbook ... 1972, vol. II, p. 236, document A/8710/Rev.1.

persons resident upon its territory". 9/ Nevertheless, even the status of the latter category of persons is different from that of the persons who were the nationals of the predecessor State on the date of the succession.

(8) Accordingly, the term "person concerned" includes neither nationals of third States nor stateless persons who where present on the territory of any of the "States concerned". It encompasses only individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession of States. By "persons whose nationality may be affected", the Commission means all individuals who could potentially lose the nationality of the predecessor State or, respectively, acquire the nationality of the successor State, depending on the type of succession of States.

(9) Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total succession, when the predecessor State or States disappear as a result of the change of sovereignty: all individuals having the nationality of the predecessor State lose this nationality as an automatic consequence of that State's disappearance. But determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial succession, when the predecessor State survives the change. In the latter case, it is possible to distinguish among at least two main groups of individuals having the nationality of the predecessor State: persons residing in the territory affected by the change of sovereignty on the date of succession of States (a category which comprises those born therein and those born elsewhere but having acquired the predecessor's nationality at birth or by naturalization) and those born in the territory affected by the change or having another appropriate connection with such territory, but not

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9/ O'Connell (1956), op. cit., pp. 257-258. Similarly, it was held in Rene Masson v. Mexico that the change of sovereignty affects only nationals of the predecessor State, while the nationality of other persons residing in the territory at the time of the transfer is not affected. (John Basset Moore, International Arbitrations to which the United States has been a Party, vol. 3, pp. 2542-2543.)

residing therein on the date of the change. Within the last category, a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State.

(10) The delimitation of the categories of persons susceptible of acquiring the nationality of the successor State is also multifaceted. In the event of total succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. In the case of the dissolution of a State, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States. Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession or transfer of a part or parts of territory. This is a function of the complexity of the situations and the need to respect the will of persons concerned.

(11) The definition in subparagraph (f) is restricted to the clearly circumscribed category of persons who had in fact the nationality of the predecessor State. The Commission might consider at a later stage whether it is necessary to deal, in a separate provision, with the situation of those persons who, having fulfilled the necessary substantive requirements for acquisition of such nationality were unable to complete the procedural stages involved because of the occurrence of the succession.

(12) The Commission decided not to define the term “nationality” in article 2, given the very different meanings attributable to it. In any case, it is felt that such a definition is not indispensable for the purposes of the draft articles.

(13) One member of the Commission expressed reservations on the definition contained in subparagraph (f), for, in his view, it should have also included the criterion of habitual residence in the territory affected by the succession.

Article 3 10/

Prevention of statelessness

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Commentary

(1) The obligation of the States involved in the succession to take all appropriate measures in order to prevent the occurrence of statelessness is a corollary of the right of the persons concerned to a nationality. As has been stated by experts of the Council of Europe, "it is a responsibility of States to avoid statelessness"; 11/ this was one of the main premises on which they based their examination of nationality laws in recent cases of succession of States in Europe.

(2) The growing awareness among States of the compelling need to fight the plight of statelessness has led to the adoption, since 1930, of a number of multilateral treaties relating to this problem, such as the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 12/ its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, as well as the 1954 Convention relating to the Status of Stateless Persons 13/ and the 1961 Convention on the Reduction of Statelessness. 14/ It is true that only very few provisions of the above Conventions directly address the issue of nationality in the context of succession of States. Nevertheless, they

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10/ Article 3 corresponds to article 2 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 40.

11/ See "Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation", Strasbourg, 2 April 1996, para. 54.

12/ See Laws concerning nationality, op. cit., p. 567.

13/ United Nations, Treaty Series, vol. 360, p. 117.

14/ Ibid., vol. 989, p. 175.

provide useful guidance to the States concerned by offering solutions which can mutatis mutandis be used by national legislators in search of solutions to problems arising from territorial change.

(3) An obvious solution consists in adopting legislation which ensures that no person having an appropriate connection to a State is excluded from the circle of persons to whom that State grants its nationality. It is, however, mainly in the regulation of conditions regarding the loss of nationality that the concern of avoiding statelessness is apparent. In the literature, it has thus been observed that the renunciation of nationality not conditioned by the acquisition of another nationality has become obsolete. 15/

(4) A technique used by the legislators of States concerned in the case of a succession of States is to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. Examples of provisions of this nature include section 2, subsection (3), of the Burma Independence Act, article 6 of the Law on Citizenship of the Czech Republic, and article 47 of the Yugoslav Citizenship Law (No. 33/96). 16/

(5) The effectiveness of national legislations in preventing statelessness is, however, limited. A more effective measure is for States concerned to conclude an agreement by virtue of which the occurrence of statelessness would be precluded. This is also the philosophy underlying article 10 of the 1961 Convention on the Reduction of Statelessness. 17/

15/ Henri Batiffol and Paul Lagarde, Droit international privé, 7th ed., vol. I (Paris, Librairie générale de droit et de jurisprudence, 1981), pp. 82-83.

16/ See Third report on nationality in relation to the succession of States, document A/CN.4/480 and Corr.1 (French only), p. 42, paras. (6) to (8) of the commentary to draft article 2 proposed by the Special Rapporteur.

17/ Article 10 reads as follows:

> "1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> "2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires

(6) Article 3 does not set out an obligation of result, but an obligation of conduct. In the case of unification of States, this distinction has no practical significance, for the obligation to take all appropriate measures to prevent persons concerned from becoming stateless means, in fact, the obligation of the successor State to attribute its nationality in principle to all such persons. 18/ However, the distinction between obligation of result and obligation of conduct is relevant in other cases of succession of States where at least two States concerned are involved. Obviously, one cannot consider each particular State concerned to be responsible for all cases of statelessness resulting from the succession. A State can reasonably be asked only to take appropriate measures within the scope of its competence as delimited by international law. Accordingly, when there are more than one successor States, they do not each have the obligation to attribute their nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection.

(7) Thus, the principle stated in article 3 cannot be more than a general framework upon which other, more specific, obligations are based. The elimination of statelessness is a final result to be achieved by means of the application of the entire set of draft articles, in particular through coordinated action of States concerned.

(8) As is the case with the right to a nationality set out in article 1, statelessness is to be prevented under article 3 in relation to persons who, on the date of the succession of States, were nationals of the predecessor State, i.e. “persons concerned” as defined in article 2, subparagraph (f). The Commission decided, for stylistic reasons, not to use the term “person concerned” in article 3, so as to avoid a juxtaposition of the expressions “States concerned” and “persons concerned”.

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territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.”

18/ This obligation is limited by the provisions of article 7.

(9) Article 3 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons. But this question is outside the scope of the present draft articles.

Article 4

Presumption of nationality

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Commentary

(1) The purpose of article 4 is to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on the question of the nationality of persons concerned following the succession. Since such persons run the risk of being treated as stateless during this period, the Commission felt it important to state, as a presumption, the principle that, on the date of the succession of States, the successor State attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession.

(2) This is, however, a rebuttable presumption. Its limited scope is expressed by the opening clause “subject to the provisions of the present draft articles”, which clearly indicates that the function of this principle must be assessed in the overall context of the other draft articles. Accordingly, when their application leads to a different result, as may happen, for example, when a person concerned opts for the nationality of the predecessor State or of a successor State other than the State of habitual residence, the presumption ceases to operate.

(3) The presumption stated in article 4 underlies the solutions envisaged in Part II for different types of succession of States, which, as indicated by article 19, have a residual character. Thus, where questions of nationality are regulated by a treaty between States concerned, as envisaged in article 17, the provisions of such treaty may also rebut the presumption of the acquisition of the nationality of the State of habitual residence.

(4) As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, “the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State.” 19/ Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. 20/ This is explained by the fact that “the population has a 'territorial' or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority”. 21/ Also, in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), “there is substantial connection with the territory concerned through residence itself.” 22/

19/ Rezek, op. cit., p. 357.

20/ O'Connell termed it “the most satisfactory test”. D.P. O'Connell, State Succession in Municipal Law and International Law, vol. I (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 518. See also the decision by an Israeli court concerning the 1952 law on Israeli nationality, according to which “[s]o long as no law has been enacted providing otherwise ... every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals - a phenomenon the existence of which has not yet been observed.” (Ian Brownlie, “The Relations of Nationality in Public International Law”, British Year Book of International Law, vol. 39 (1963), p. 318.) In another case, however, it was held that Israeli nationality had not existed prior to the adoption of the law in question. (Ibid.)

21/ Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), p. 665.

22/ “The Czech and Slovak citizenship laws and the problem of statelessness”, document prepared by UNHCR, February 1996, para. 29. As it has also been noted, “it is in the interest of the successor State ... to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are considered to be 'foreigners' in 'their own country' clearly that is not in the interest of the State itself.” Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 144.

Article 5 23/

Legislation concerning nationality and other connected issues

Each State concerned should, without undue delay, enact legislation concerning nationality and other connected issues arising in relation to the succession of States consistent with the provision of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Commentary

(1) Article 5 is based on the recognition of the fact that, in the case of a succession of States, in spite of the role reserved to international law, domestic legislation with regard to nationality has always an important function. The main focus of this article, however, is the issue of the timeliness of internal legislation. In this respect, the practice of States varies. While in some cases the legislation concerning nationality was enacted at the time of the succession of States, 24/ in other cases the nationality laws were enacted after the date of the succession, sometimes even much later. 25/ The term "legislation" as used in this article should be interpreted broadly: it includes more than the texts drafted by Parliament. 26/

(2) It would not be realistic in many cases to expect States concerned to enact such legislation at the time of the succession. In some situations, for instance where new States are born as a result of a turbulent process and

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23/ Article 5 corresponds to article 3, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 45.

24/ This was the case of a number of newly independent States. See Materials on succession of States in respect of matters other than treaties, United Nations Legislative Series, ST/LEG/SER.B/17, passim. For more recent examples, see, e.g., the Law on Acquisition and Loss of Citizenship of the Czech Republic of 29 December 1992, enacted in parallel to the dissolution of Czechoslovakia, and the Law on Croatian Nationality of 28 June 1991, enacted in parallel to the proclamation of the independence of Croatia.

25/ See, e.g., the Law on Israeli Nationality of 1952, referred to in footnote [20] above.

26/ See a similar interpretation by Rezek of the notion of legislation in relation to nationality, op. cit., p. 372.

territorial limits are unclear, this would even be impossible. Accordingly, article 5 sets out a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States "without undue delay". The period which meets such test may be different for each State concerned, even in relation to the same succession. Indeed, the situation of a predecessor State and a successor State born as a result of separation may be very different in this regard. For example, the question of the loss of the nationality of the predecessor State may be already adequately addressed by pre-existing legislation. 27/

(3) The Commission considered it necessary to state explicitly that the legislation to be enacted by States concerned should be "consistent with the provisions of the present draft articles". This underscores the importance of respect for the principles set out in the draft articles, to which States are urged to give effect through their domestic legislation. This is without prejudice to the obligations that States concerned may have under the terms of any relevant treaty. 28/

(4) The legislation envisaged under article 5 is not limited to the questions of attribution or withdrawal of nationality in a strict sense, and, where appropriate, the question of the right of option. It should also address "connected issues", i.e. issues which are intrinsically consequential to the change of nationality upon a succession of States. These may include such matters as the right of residence, the unity of families, military obligations, pensions and other social security benefits, etc. States concerned may find it preferable to regulate such matters by means of a treaty, 29/ a possibility that article 5 in no way precludes.

27/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89, as regards the cession by Finland of part of its territory to the Soviet Union in 1947.

28/ The principle that "the contractual stipulations between the two [States concerned] ... shall always have preference" over the legislation of States involved in the succession is also embodied in Article 13 of the Bustamante Code. See "Code of Private International Law" (Code Bustamante), League of Nations, Treaty Series, vol. LXXXVI, No. 1950.

29/ For examples of such practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480, footnote 282.

(5) The second sentence of article 5 reflects the importance that the Commission attaches to ensuring that persons concerned are not reduced to a purely passive role as regards the impact of the succession of States on their individual status or confronted with adverse effects of the exercise of a right of option of which they could objectively have no knowledge when exercising such right. This issue arises, of course, only when a person concerned finds itself having ties with more than one State concerned. The reference to "choices" should be understood in a broader sense than simply the option between nationalities. The measures to be taken by States should be "appropriate" and timely, so as to ensure that any rights of choice to which persons concerned may be entitled under their legislation are indeed effective.

(6) Given the complexity of the problems involved, and the fact that certain "connected issues" may sometimes only be resolved by means of a treaty, article 5 is couched in terms of a recommendation. Some members, however, considered that the formulation of the first sentence of article 5 in terms of an obligation was more appropriate.

Article 6 30/

Effective date

> The attribution of nationality in relation to the succession of States shall take effect on the date of such succession. The same applies to the acquisition of nationality following the exercise of an option, if persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Commentary

(1) The Commission recognized that one of the general principles of law is the principle of non-retroactivity of legislation. As regards nationality issues, this principle has an important role to play, for as stated by Lauterpacht, "[w]ith regard to questions of status, the drawbacks of retroactivity are particularly apparent." 31/ However, the Commission

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30/ Article 6 corresponds to article 3, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 45.

31/ Hersch Lauterpacht, "The Nationality of Denationalized Persons", The Jewish Yearbook of International Law (1948), p. 168.

considered that, in the particular case of a succession of States, the benefits of retroactivity justify an exception to the above general principle, notwithstanding the fact that the practice of States is inconclusive in this respect.

(2) Article 6 is closely connected to the issue dealt with in article 5. It has however, a broader scope of application, as it covers the attribution of nationality not only on the basis of legislation, but also on the basis of a treaty. If such attribution of nationality after the date of the succession of States did not have a retroactive effect, statelessness, even if only temporary, could ensue. Under the terms of article 6, the retroactive effect extends to the acquisition of nationality following the exercise of an option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option. The Commission decided to formulate this article in terms of obligations incumbent on States concerned, in particular to ensure consistency with the obligations of such States with a view to preventing statelessness under article 3.

(3) Article 6 is the first article where the expression “attribution of nationality” is used. The Commission considered it preferable, in the present draft articles, to use this term rather than the term “granting” to refer to the act of the conferral by a State of its nationality to an individual. It was felt that the term “attribution” best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization. Where a provision is drafted from the perspective of the individual, the Commission has used the expression “acquisition of nationality”.
